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JAMIL DZULKARNAIN v. MOHAMAD KAMIL SHAFIE

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
B [CIVIL APPEAL NO: W-02(IM)-884-05-2014]
10 NOVEMBER 2014

ELECTION: *Disqualification – Member of State Legislative Assembly – Application for – Grounds – Respondent not resident of state – Whether respondent*
C *fulfilled constitutional requirement – Whether appellant discharged onus probandi of proving that respondent was not residing in or was absent from state with no intention of returning – Laws of the Constitution of Perak, art. XXX – Election Offences Act 1954, s. 32(e) – Federal Constitution, art. 118*

D ***CONSTITUTIONAL LAW:*** *Election – Method of challenging – Allegation that member of State Legislative Assembly not resident of state – Application by way of originating summons – Whether action fell under art. 118 of Federal Constitution – Whether correct mode of commencement – Whether application had effect of vitiating election*

E The appellant, by way of originating summons ('OS'), sought a declaration that the respondent was not qualified to be a member of the Legislative Assembly of the State of Perak ('Legislative Assembly') by virtue of art. XXX of the Laws of the Constitution of Perak ('the State Constitution') and an injunction to perpetually restrain the respondent from entering or
F being present at or participating in any proceeding of the legislative assembly. The ground that the appellant relied on was that when the respondent contested as a candidate and won in the general election in the state constituency of Manong, he was not a resident of the State of Perak. Instead, he was, at the material time, residing in the Federal Territory of Kuala Lumpur. Therefore, the appellant was not qualified to be a member
G of the Legislative Assembly. The High Court struck out the appellant's OS under O. 18 r. 19 of the Rules of Court 2012 and hence, this appeal. The respondent contended that the action commenced by the appellant and the reliefs sought contravened art. 118 of the Federal Constitution ('the Constitution').

H **Held (dismissing appeal; affirming decision of the High Court)**
Per Idrus Harun JCA delivering the judgment of the court:

(1) In order to qualify to be a member of the Legislative Assembly, a person has to reside in the state of Perak. If he does not fulfil the constitutional
I requirement, the person is disqualified and if he is elected in an election, the ground in s. 32(e) of the Election Offences Act 1954 ('the Act') could be relied on for the avoidance of his election. However, the instant appeal was not a challenge on the result of the election but merely a

challenge on the respondent's qualification to be a member of the Legislative Assembly. Therefore, the action could not be treated as a ground for avoidance of the election of the respondent under s. 32 of the Act. (paras 9 & 18)

(2) Apart from having physical presence with some degree of permanency in the location or state in question, the intention to return to his fixed permanent or usual abode whenever he was absent from the address in the state was an important element in determining a person's residence. The appellant had failed to discharge the *onus probandi* to prove his allegation that the respondent, at the relevant time, was not residing in or was absent from Perak with no intention of returning to the state. The court was satisfied that the respondent was indeed residing in the State of Perak and accordingly art. XXX of the State Constitution had not been contravened. (paras 28 & 29)

(3) The action was, in its true nature and essence, a challenge to the respondent's election as a member of the Legislative Assembly and therefore fell squarely within art. 118 of the Constitution. Article 118 of the Constitution is expressed in peremptory and prohibitory language and together with the Act confers certain special rights and provides a remedy for enforcing those rights by the court which possesses a special and peculiar kind of jurisdiction. Hence, the action should have been brought in accordance with the specific mode of commencement before the High Court as required by and which is vested with the special jurisdiction under art. 118 of the Constitution. (paras 10, 13 & 14)

(4) A challenge or an application as in this appeal had the effect of vitiating an election and an attempt to circumvent art. 118 of the Constitution and the election law which are special laws enacted to resolve election disputes. The action was therefore an attempt to get around art. 118 of the Constitution and the election law. (paras 14 & 15)

(5) The appellant had the best and earliest opportunity to raise the issue immediately after the general election 2013. However, the election petition that he filed against the respondent challenging the election result of the state constituency of Manong was grounded only upon allegations of general bribery and non-compliance with written law. The issue of the respondent's qualification was never raised as a ground in the election petition, which was dismissed by the High Court and the decision was subsequently upheld by the Federal Court. (para 16)

(6) If want of qualification becomes apparent on the face of the nomination paper, it is the duty of the returning officer to reject the same under reg. 7(1)(b) and (c) of the Elections (Conduct of Elections) Regulations 1981. However, what was apparent in the case of the respondent was that the nomination paper was accepted which presumably the returning officer must have been satisfied that the respondent was in law qualified

A to contest. In the circumstances, the appellant's present application, seeking to declare the respondent not qualified to be a member of the Legislative Assembly, was an attempt to get a second bite of the cherry. (paras 16 & 18)

Bahasa Malaysia *Translation Of Headnotes*

B

Perayu, melalui saman pemula ('SP'), memohon deklarasi bahawa responden tidak layak menjadi ahli Dewan Undangan Negeri Perak ('Dewan Undangan') menurut perkara XXX Undang-Undang Tubuh Kerajaan Perak ('Undang-Undang Negeri') dan injunksi untuk menghalang sama sekali responden daripada memasuki atau hadir atau mengambil bahagian dalam apa-apa prosiding Dewan Undangan. Alasan yang disandarkan oleh perayu adalah bahawa apabila responden bertanding sebagai calon dan memenangi pilihanraya umum dalam kawasan negeri di Manong, dia bukan penduduk Negeri Perak. Sebaliknya, pada masa material, dia menetap di Wilayah Persekutuan Kuala Lumpur. Oleh itu, perayu tidak layak menjadi ahli Dewan Undangan. Mahkamah Tinggi membatalkan SP perayu di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 dan dengan itu, rayuan ini. Responden menghujahkan bahawa tindakan tersebut dimulakan oleh perayu dan relif-relif yang dipohon bercanggah dengan per. 118 Perlembagaan Persekutuan ('Perlembagaan').

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Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Untuk layak menjadi ahli Dewan Undangan, seseorang perlu menetap di Negeri Perak. Jika dia tidak memenuhi keperluan Perlembagaan tersebut, dia tidak layak dan jika dipilih dalam pilihanraya, alasan di bawah s. 32(e) Akta Kesalahan Pilihanraya 1954 ('Akta') akan disandarkan untuk membatalkan pemilihan tersebut. Walau bagaimanapun, rayuan ini bukan cabaran terhadap keputusan pilihanraya tetapi hanya cabaran terhadap kelayakan responden untuk menjadi ahli Dewan Undangan. Oleh itu, tindakan tersebut tidak boleh dianggap sebagai alasan untuk membatalkan pemilihan responden di bawah s. 32 Akta.

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(2) Selain hadir secara fizikal dengan tahap pendudukan tetap tertentu di kawasan atau negeri yang dipersoalkan, niat untuk kembali ke kediaman tetap atau biasa semasa dia tiada di alamat di negeri tersebut adalah unsur penting dalam menentukan kediaman seseorang. Perayu telah gagal melepaskan *onus probandi* untuk membuktikan dakwaannya bahawa responden, pada masa material, tidak menetap atau tidak ada di Perak tanpa niat untuk kembali ke negeri tersebut. Mahkamah berpuas hati bahawa responden sememangnya menetap di Negeri Perak dan dengan itu perkara XXX Undang-Undang Negeri tidak dilanggar.

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(3) Tindakan tersebut adalah, dalam maksud dan sifat sebenar, suatu cabaran terhadap pemilihan responden sebagai ahli Dewan Undangan dan oleh itu terangkum dalam per. 118 Perlembagaan. Perkara 118 Perlembagaan adalah dinyatakan dalam bahasa yang muktamad dan melarang dan bersama-sama dengan Akta tersebut memberikan hak-hak istimewa tertentu dan memperuntukkan remedi bagi pelaksanaan hak-hak tersebut oleh mahkamah yang mempunyai bidang kuasa yang khas dan khusus. Oleh itu, tindakan tersebut sepatutnya dimulakan menurut cara permulaan spesifik di Mahkamah Tinggi seperti yang diperlukan dan terletak hak dengan bidang kuasa khas di bawah per. 118 Perlembagaan.

(4) Cabaran atau permohonan seperti dalam rayuan ini mempunyai kesan membatalkan pilihanraya dan cubaan untuk memintas per. 118 Perlembagaan dan undang-undang pilihanraya yang merupakan undang-undang khas yang digubal untuk menyelesaikan pertikaian pilihanraya. Tindakan tersebut oleh itu adalah suatu cubaan untuk memintas per. 118 Perlembagaan dan undang-undang pilihanraya.

(5) Perayu mempunyai peluang yang terbaik dan terawal untuk membangkitkan isu tersebut sejurus selepas pilihanraya umum 2013. Walau bagaimanapun, petisyen pilihanraya yang difailkannya terhadap responden mencabar keputusan pilihanraya kawasan negeri Manong adalah diasaskan kepada hanya dakwaan-dakwaan rasuah umum dan ketidakpatuhan undang-undang bertulis. Isu kelayakan responden tidak pernah dibangkitkan sebagai alasan dalam petisyen pilihanraya tersebut, yang telah ditolak oleh Mahkamah Tinggi dan keputusan tersebut kemudiannya disahkan oleh Mahkamah Persekutuan.

(6) Jika ketiadaan kelayakan adalah jelas dalam kertas penamaan calon, adalah menjadi kewajipan pegawai pengurus untuk menolaknya di bawah per. 7(1)(b) dan (c) Peraturan-Peraturan Pilihanraya (Penjalanan Pilihanraya) 1981. Walau bagaimanapun, apa yang jelas dalam kes responden adalah bahawa kertas penamaan calon telah diterima yang mana kemungkinannya adalah bahawa pegawai pengurus berpuas hati bahawa responden layak dari segi undang-undang untuk bertanding. Dalam keadaan tersebut, permohonan perayu, yang memohon untuk mengisytiharkan responden sebagai tidak layak menjadi ahli Dewan Undangan, adalah cubaan untuk mendapatkan peluang kedua.

Case(s) referred to:

Devan Nair v. Yong Kuan Teik [1967] 1 LNS 37 PC ***(refd)***

Durga Shankar Mehta v. Raghuraj Singh AIR 1954 SC 520 ***(dist)***

Election Commission, Malaysia v. Abdul Fatah Haron [1987] 2 CLJ 193; [1987] CLJ (Rep) 92 SC ***(refd)***

Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd [1998] 4 CLJ Supp 112 HC ***(refd)***

Hashim Hj Jasin lwn. Hj Abdullah Hassan & 2 Yang Lain [2008] 1 LNS 544 HC ***(refd)***

A *K Venkatachalam v. A Swamickan AIR 1999 SC 1723* ***(dist)***
Tengku Korish v. Mohamed Jusoh & Anor And Abdul Raouf v. Ibrahim Arshad & Anor And Mokhtar Abdullah v. Mokhtar Haji Daud & Anor [1969] 1 LNS 189 HC ***(refd)***
Ustaz Abd Khalid Rasid v. Dato' Seri Abdullah Ahmad Badawi & Yang Lain & Satu Kes Lagi [2005] 2 CLJ 385 HC ***(refd)***
Wee Choo Keong v. Lee Chong Meng & Anor [1998] 1 CLJ 705 FC ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, s. 25(2)
Election Offences Act 1954, ss. 32(b), (e), 33, 35(a), (b), 36A, 36B, 38
Elections (Conduct Of Elections) Regulations 1981, regs. 7(1)(b), (c)
Federal Constitution, arts. 4, 47, 113(5), 118, 119, 121
C National Registration Regulations 1990, reg. 24
Rules of Court 2012, O. 18 r. 19

Constitution of India, arts. 136, 226, 329
Representation of the People Act 1951, s. 105

D *For the appellant - Chan Kok Keong (James Huntzen Ong with him); M/s Chan & Assocs*
For the respondent - Mohd Hafarizam Harun (Choo Shi Jin with him); M/s Hafarizam Wan & Aisha Mubarak

[Appeal from High Court, Kuala Lumpur; Originating Summons No: 24-49-07/2013]

Reported by S Barathi

E

JUDGMENT

Idrus Harun JCA:

[1] There are two appeals before this court. These are:

F (i) Rayuan Sivil No.: W-02(IM)-884-05/2014; and

(ii) Rayuan Sivil No.: W-02(IM)-885-05/2014.

[2] At the outset, it must be observed that both appeals involve similar facts and issues with both the appellants seeking the same reliefs. That being
G the case, learned counsel for both parties had agreed to proceed with the above appeal number (i) only and that the decision in respect of the said appeal would bind the second appeal.

[3] To appreciate the contentions that have been raised before the court,
H it would be most apposite to state briefly the material facts. The appellant is appealing against the decision of the learned High Court Judge delivered on 10 April 2014 allowing the respondent's notice of application under O. 18 r. 19 of the Rules of Court 2012 to strike out the appellant's originating summons filed in that court on 10 July 2013.

I **[4]** The appellant filed the abovesaid originating summons seeking a declaration that the respondent is not qualified to be a member of the Legislative Assembly of the State of Perak ("Legislative Assembly") by

virtue of Article XXX of the Laws of the Constitution of Perak ("State Constitution") and an injunction to perpetually restrain the respondent from entering or being present at or participating in any proceeding of the Legislative Assembly. The ground relied on by the appellant in this action is that when the respondent as a candidate contested and won in the general election on 5 May 2013 in the state constituency of Manong, the respondent was not a resident in the State of Perak. Instead, he was at that material time residing in the Federal Territory of Kuala Lumpur. Therefore, the appellant is not qualified to be a member of the Legislative Assembly.

[5] The respondent denies the allegation and replies in his affidavit that he is a resident in the State of Perak and his identity card bears his residence address in the said state.

[6] Before we embark on our deliberation in respect of the issue of a constitutional requirement that only a person residing in the State of Perak is qualified to be a member of the Legislative Assembly, it is necessary at this early stage of our judgment to consider whether this action is maintainable in the first place as according to learned counsel for the respondent, in actuality the action the appellant has commenced and the reliefs he is seeking have contravened art. 118 of the Federal Constitution. For convenience we set out below art. 118 of the Federal Constitution:

> Method of challenging election
>
> 118. No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

[7] The Election Offences Act 1954 (Act 5) provides for the manner in which and the grounds upon which the election of a candidate may be declared void. One of the grounds that can be relied on for avoidance of the election of a candidate is that the candidate was at the time of his election a person disqualified for election. This ground is provided in s. 32(e) of the Act 5. In addition, the reliefs to which the petitioner may be entitled to claim among others include a declaration that the election is void or a declaration that the person was not duly elected or ought not to have been returned. This is found in s. 35(a) and (b) of the Act 5. Hearing of the election petition is required to be before a High Court presided over by an election judge nominated in accordance with s. 33 of the Act 5. The High Court for this purpose is the designated court for the election judge to sit and vested with additional specific jurisdiction [*Wee Choo Keong v. Lee Chong Meng & Anor* [1998] 1 CLJ 705; [1998] 1 MLJ 434]. Thus, art. 118 of the Constitution provides for a specific mode of seeking right of election and sitting in the legislature both of the House of Representatives and the Legislative Assembly, leaving the details relating to procedure to be filled in by way of an Act of Parliament namely Act 5.

[8] The question that we have to decide in this appeal, therefore, is whether the present action and the reliefs sought therein by the appellant contravenes art. 118 of the Federal Constitution. To appreciate the contention raised by learned counsel for the appellant it is desirable to set out the provisions of Article XXX of the State Constitution:

> Qualification of members
>
> XXX. Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be a member of the Legislative Assembly, unless he is disqualified for being a member by the Federal Constitution or this Constitution or by any such law as is mentioned in Article XXXI.

[9] It is quite clear that a person, to qualify to be a member of the Legislative Assembly, has to reside in the state of Perak. If he does not fulfil this constitutional requirement, the person is disqualified and if he is elected in an election, the ground in s. 32(e) of the Act 5 can be relied on for the avoidance of his election. The disqualification under this Article is, in our view, in addition to the grounds for disqualification provided for under Article XXXI of the State Constitution.

[10] The appellant claims that the respondent is not a resident in the state of Perak. If the allegation is true that obviously would disqualify the respondent for being a member of the Legislative Assembly by virtue of Article XXX of the State Constitution and would also vitiate his election on 5 May 2013, hence requiring a by-election. Even though the appellant is merely seeking a declaration that the respondent is not qualified to be a member of the Legislative Assembly and an injunction to restrain him from being present or participating in any proceeding thereat, the case does not end with the granting of these reliefs in the event the court decides in the appellant's favour. The direct and immediate effect of such reliefs is to disqualify the respondent, and consequently under cl. (1) of Article XXXIV of the State Constitution since the respondent is already a member of the Legislative Assembly, his seat shall become vacant. Under cls. (2) and (3) of the same article the respondent's election and nomination shall become void. The action instituted by way of the originating summons, in our considered opinion, in its true nature and essence is a challenge to the respondent's election as a member of the Legislative Assembly. As such, the present action falls squarely within art. 118 of the Federal Constitution which bars an election from being questioned in any action other than by way of an election petition. Under the circumstances, the action should have been brought in accordance with the specific mode of commencement before an appropriate forum namely the High Court as required by, and which is vested with a special jurisdiction under, art. 118 of the Federal Constitution. This, in our judgment, is the correct step which the appellant should have taken and it has been recognised by the court in several authorities.

[11] The first case which we need refer is *Election Commission, Malaysia v. Abdul Fatah Haron* [1987] 2 CLJ 193; [1987] CLJ (Rep) 92. Where an *ex parte* application for an interim injunction was made before the High Court to restrain the Election Commission from calling for nominations in order to hold a by-election before finalisation of the election petition filed by the respondent, the Supreme Court commented:

> The Constitution also provides that any matter which has the effect of vitiating an election should be brought up before an appropriate forum. Article 118 of the Federal Constitution reads:
>
> > No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.
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> Section 33(1) of the Election Offences Act 1954 states:
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> > Every election petition shall be tried by the Chief Justice or by a Judge of any High Court nominated by the Chief Justice for the purpose:
> >
> > > Provided that the Chief Justice shall not nominate a Judge of a High Court of which he is not Chief Justice without consulting the Chief Justice of that High Court.
>
> Any dissatisfaction with or challenge to an election should be brought up by way of an election petition before an Election Judge and nowhere else.

[12] Article 118 of the Constitution is drafted in peremptory manner as evident by the opening words "No election ... shall be called in question except ...". The provision is prohibitory, strong and not misleading, that is to say, any dispute about an election of a representative to the House of Representatives or Legislative Assembly can be determined by way of an election petition before the High Court and not in any other manner such as *certiorari* or *mandamus* [see *Ustaz Abd Khalid Rasid v. Dato' Seri Abdullah Ahmad Badawi & Yang Lain & Satu Kes Lagi* [2005] 2 CLJ 385]. In fact, both art. 118 of the Federal Constitution and Act 5 confer certain special rights and provide a remedy for enforcing those rights. The court which administers it possesses a special or peculiar kind of jurisdiction. It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it [see *Tengku Korish v. Mohamed Jusoh & Anor And Abdul Raouf v. Ibrahim Arshad & Anor And Mokhtar Abdullah v. Mokhtar Haji Daud & Anor* [1969] 1 LNS 189; [1970] 1 MLJ 6].

[13] In the case of *Hashim Hj Jasin lwn. Hj Abdullah Hassan & 2 Yang Lain* [2008] 1 LNS 544, the plaintiff filed an originating summons seeking amongst others a declaration that the second and third defendants had by mistake declared the first defendant as the candidate who had been elected to the Legislative Assembly. The High Court held that the plaintiff's action

A by way of the originating summons was a mistake in law. The plaintiff's action was an attempt to circumvent art. 118 and the election law which was specially enacted to resolve election disputes. The application was an abuse of the process of the court.

B **[14]** It would seem plain from those cases that art. 118 of the Constitution is expressed in peremptory and prohibitory language and together with Act 5 confer certain special rights and provide a remedy for enforcing those rights by the court which possesses a special and peculiar kind of jurisdiction. A challenge or an application as in this appeal has the effect of vitiating an election and an attempt to circumvent art. 118 of the Constitution and the C election law which are special laws enacted to resolve election disputes. Any such application should be instituted by way of an election petition, otherwise it is an abuse of the process of the court.

[15] Thus, based on these authorities, it is hard to resist the conclusion that the present action, under the guise of the originating summons seeking to D declare the respondent not qualified to be a member of the Legislative Assembly is in pith and substance a bid to disqualify him from being a member of that Assembly. It is indeed an attempt to get around art. 118 of the Constitution and the election law which are intended to resolve election disputes. Whether the respondent is qualified or otherwise is actually related E to an election dispute which should and ought to be resolved in the manner specified under art. 118 of the Constitution and s. 32 of the Act 5.

[16] The appellant had the best and earliest opportunity to raise this issue immediately after the general election in 2013. However, an election petition No: 26PP-10-06/2013 which he had filed against the respondent challenging F the election result of the state constituency of Manong was grounded upon allegations of general bribery and non-compliance with written law only. The issue of the respondent's qualification was never raised as a ground in that election petition. The election judge had dismissed the election petition following a preliminary objection by the respondent. The Federal Court, G upon hearing the merits of the petition, dismissed the appeal and upheld the High Court's decision. He had undoubtedly missed the opportunity at the earliest possible time to challenge the respondent's candidature during nomination pursuant to reg. 7(1)(c) of the Elections (Conduct Of Elections) Regulations 1981 which empowers the returning officer to reject a H nomination paper of a candidate on the ground that he is disqualified from being a member of the Legislative Assembly and dispute the election result on this ground in the election petition that he had filed. Now the appellant is coming to the court once again seeking valiantly to declare the respondent not qualified to be the member of the Legislative Assembly on this ground. I In our judgment, this is a colourable claim appearing to be true but in reality it is an attempt to get a second bite of the cherry.

[17] Our attention has been drawn to the relevant parts of reg. 7(1)(b) and (c) of the Elections (Conduct of Elections) Regulations 1981 which gives the power to the returning officer to reject a nomination of any candidate for any constituency on the grounds that:

(a) It is apparent from the contents of the nomination paper that the candidate is not capable of being elected as a member of a State Legislative Assembly; and

(b) The candidate is disqualified from being a member under the Constitution of the State in the case of an election to a State Legislative Assembly.

[18] It further provides that where the returning officer has made a decision, any such decision is final and conclusive for the purpose of the election and cannot be questioned in any court. However, any person aggrieved by the decision of the returning officer may present an election petition on the grounds set out in s. 32(b) of the Election Offences Act 1954 (Act 5).

[19] What emanates from these provisions so far as it relates to the present appeal, is that if want of qualification becomes apparent on the face of the nomination paper it is the duty of the returning officer to reject the same. However what is apparent in the case of the respondent is that the nomination paper was accepted which presumably the returning officer must have been satisfied that the respondent was in law qualified to contest. It is necessary to mention at this juncture that though reg. 7 of the Elections (Conduct of Elections) Regulations 1981 does not provide for an objection to be raised as in the previous reg. 7, we are of the view that it is still open to the appellant, that if he was at the time of nomination aware of the fact of the respondent's disqualification, to bring it to the attention of the returning officer. It is implied in reg. 7 that, once this issue of disqualification is brought to his attention it is incumbent upon the returning officer to enquire into the matter and determine whether there is evidence to establish that the respondent is not qualified to contest before he could decide to reject or otherwise accept the nomination paper. Next, notwithstanding the finality and conclusiveness of the decision of the returning officer, the appellant could present an election petition in accordance with s. 32(b) of the Act 5 which the appellant did but on the ground unrelated to the present action.

[20] We were pressed by the argument of learned counsel for the appellant, that the instant appeal was not a challenge on the result of the election but merely a challenge on the respondent's qualification to be a member of the Legislative Assembly. Therefore, the action could not be treated as a ground for avoidance of the election of the respondent under s. 32 of the Act 5.

[21] Learned counsel for the appellant placed heavy reliance on two Indian decisions in *K Venkatachalam v. A Swamickan* AIR 1999 SC 1723 and *Durga Shankar Mehta v. Raghuraj Singh* AIR 1954 SC 520 as authority that an

ordinary court is seised with the power to hear election disputes by way of an ordinary action. In *K Venkatachalam*, the Supreme Court relied on art. 226 of the Constitution of India in deciding that the High Court could exercise jurisdiction and declare that the election was illegal notwithstanding art. 329 thereof which barred interference of court in electoral matters. It is to be observed that art. 226 of the Constitution of India deals with the power of the High Court to issue directions, orders or writs similar to prerogative writs or orders under our Courts of Judicature Act 1964 (Act 91). However, there are no corresponding provisions in the Federal Constitution. Accordingly the High Court does not have similar constitutional powers as provided in the said art. 226 of the Constitution of India. In fact, the Federal Constitution in art. 121 vests judicial powers in the two High Courts by way of federal law. The power which is akin to those provided for in art. 226 of the Constitution of India is found in s. 25(2) of the Act 91 which comes in the form of additional powers of the High Court to issue prerogative writs in para. 1 of the Schedule thereto. This is where *K Venkatachalam* is in marked contrast to the instant action.

[22] While art. 226 which vests the powers with the High Court as aforesaid coexists with art. 329 which bars interference by courts in electoral matters and provides for a specific method of challenging election (as in our art. 118), in Malaysia the mode of challenging election is a creature of the Constitution in art. 118 but the additional powers of the High Court is a statutory creation by way of an ordinary Act of Parliament. Needless to say, no ordinary Act of Parliament can be enacted to override or be inconsistent with the Federal Constitution otherwise it will run foul of art. 4 thereof. Thus, unlike in India, while this special remedy is found in the Federal Constitution, no other remedy by ordinary action in a court of law is available to a person in regard to election disputes. Accordingly *K Venkatachalam* is of little or no assistance to the appellant's contention that this action can be sustained before the ordinary court.

[23] Turning now to the second case, it would seem clear that the case commenced by way of an election petition before the Election Tribunal and following the setting aside of the elections of the candidates, an appeal by way of special leave was filed with the Supreme Court. Thus in *Durga*'s case, the petition had commenced before the Election Tribunal and once the Election Tribunal had made a determination on the election matter, the powers of the Supreme Court to interfere could be exercised. It is to be noted that s. 105 of the Representation of the People Act 1951 gave finality to the decision of the Election Tribunal and did not provide for any further appeal. That being the case, the Supreme Court granted special leave by invoking art. 136 of the Constitution of India for the appellant to appeal. *Durga*'s case, therefore, is distinguishable from the instant appeal for two reasons. Firstly, in the present appeal the appellant has commenced this action before the ordinary court without going through the legal process in the High Court by

way of an election petition in accordance with art. 118 of the Constitution and following the prescribed procedure in Act 5. Secondly, while the Representation of the People Act 1951 gave finality to the determination of the election tribunal, in our election system the law allows an appeal to be made to the Federal Court in accordance with s. 36A of the Act 5 before the decision becomes final. The appellant as mentioned earlier, had apparently exhausted the remedy available to him without of course relying on the ground in respect of which the present action is based. *Durga*'s case is, in our view, does not in any way help the appellant in advancing his argument that he can pursue his complaint against the respondent seeking reliefs as prayed by this mode of commencement.

[24] After careful consideration of the application we are of the opinion that the learned High Court Judge rightly struck out the originating summons under O. 18 r. 19 of the Rules of Court 2012. The claim is obviously unsustainable, discloses no reasonable cause of action, and is frivolous, vexatious and an abuse of the process of the court. In consequence the appeal must be dismissed.

[25] Notwithstanding our decision on the first issue above, we feel compelled to discuss in detail, in view of its importance, the arguments which have been addressed to us on the crucial question of qualification of the respondent as the elected member of the Legislative Assembly. Briefly, the appellant's complaint that the respondent was not a resident of the state of Perak was based on a search made on the Register of Voters belonging to Parti Islam Se-Malaysia (PAS) which indicates that the respondent's address is in Kuala Lumpur and the averments in the supplementary affidavit affirmed by Ananda Sivam a/l Subrayan on 16 July 2013. The respondent has affirmed that he does in fact live at the address stated in his affidavit and his identity card bears a residence address in the state of Perak. The identification document of the respondent is a legal document relating to the identity of a person issued by a public authority namely the National Registration Department pursuant to the National Registration Act 1959 (Act 78) and regulations made thereunder. We accept that in the absence of any evidence to the contrary, the burden of which by virtue of reg. 24 of the National Registration Regulations 1990 is on the appellant to establish, the evidence with respect to the respondent's address appearing in his identification card and his deposition in the affidavit is *prima facie* proof that the respondent is residing in the State of Perak and has thus sufficiently rebutted the appellant's case that the respondent at the material time did not reside in the State of Perak. As regards the PAS Register of Voters, the source of information stated in the register is unknown and in the absence of any explanation as to its source the same could not have been inferred to come from an official source thus making such information less reliable when compared with the respondent's identity card. In any event, we agree with learned counsel for the respondent that the Register of Voters contains

inaccurate information relating to the date of birth of the respondent and thus casting further doubt on the accuracy of the document. Based on the foregoing analysis of the evidence, we cannot accede to the argument urged upon us by the appellant that the identity card produced by the respondent is not conclusive proof that he is resident in the State of Perak.

[26] We are mindful of the fact that no definition is to be found in the election law relating to the word "resident" for the purpose of determining the eligibility of a candidate to contest in an election. Neither did learned counsel for the appellant and respondent address this issue adequately. We would like to point out at this juncture that both art. 47 of the Federal Constitution and Article XXX of the State Constitution which provide for qualification of a member of both legislative bodies, use the word "resident". As in the election law, the word "resident" in both Constitutions is not defined either. So, the question that comes to mind is what is the definition of or what constitutes "resident" in the context of the election law. In this regard art. 113(5) of the Constitution allows the Election Commission to make rules for the purposes of its functions. In fact, the election commission has pursuant to this article made the Constitution (Election Commission) Rules, 1960 [L.N. 110] for the purpose of determining the question arising under art. 119 of the Constitution as to a person's residence who wants to register as an elector on the qualifying date. The rules however are not related to or do not have provisions dealing with a candidate's residence for the purpose of contesting in an election. Notwithstanding the absence of such provisions or law however, we are of the view that the principles stated in the rules applicable in determining the residence of an elector can serve as a useful and indeed valuable guide in considering a similar issue under art. 47 of the Federal Constitution and Article XXX of the State Constitution. The rules provides:

> 3. Without prejudice to cl. (2) of art. 119 of the Constitutions and to the general principles set out in r. 2, a person's residence in a dwelling house shall not be deemed to have been interrupted:
>
> a. by reason of that person's absence in the performance of any duty arising from or incidental to any office, service or employment held or undertaken by him, if he intends to resume actual residence within six months of giving up such office, service or employment and will not be prevented by the performance of the duty aforesaid; or
>
> b. by reason of permission being given by letting or otherwise for its occupation furnished by other person:
>
> (i) if the permission is given in the expectation that throughout the period for which it is given the person giving it or his wife or her husband will be absent in the performance of any such duty as aforesaid; or

(ii) if the first mentioned person intends to resume actual residence within nine weeks of giving it up and will not be prevented by the permission given as aforesaid.

[27] The general principle set out in r. 2 requires regard to be had to the purpose and other circumstances, as well as to the fact of the person's presence at or absence from the address in question. These rules in the main encompass two components:

(a) A person's residence in a dwelling house in the location or state concerned; and

(b) His residence is not interrupted if he has the intent to return there whenever he is absent from his fixed and usual abode.

[28] We find, consistent with these principles, that the meaning and definition given in the case of *Fong Poh Yoke & Ors v. The Central Construction Company (Malaysia) Sdn Bhd* [1998] 4 CLJ Supp 112 as correct wherein it was stated that the "term 'residence' connotes residence in one place with some degree of continuity and apart from accidental or temporary absences." In our view, therefore, apart from having physical presence with some degree of permanency in the location or state in question, the intention to return to his fixed, permanent or usual abode whenever he is absent from the address in the state is an important element in determining a person's residence. The fact of his absence from his dwelling house may or may not show that he is no more a resident in any particular place or state. As long as he has the intention to return, the person's residence remains in the location or state concerned.

[29] It is in the context of these principles that the appellant has to prove his allegation with reliable and cogent evidence that the respondent at the relevant time was not residing in or was absent from Perak with no intention of returning to the state. His alleged absence could be due to the performance of service, duty or employment elsewhere or he is no longer residing there. But as long as the respondent has the intention to resume actual residence that in our view is sufficient to prove residence. The onus of proof lies with the appellant who lays the charges but he has failed to discharge this *onus probandi*. In any event we are satisfied, after taking into account the evidence adduced by the respondent, that the respondent was indeed residing in the state of Perak and accordingly Article XXX of the State Constitution has not been contravened.

[30] Before concluding, it may be of some interest to say that Act 5 prescribes the time frame in ss. 36A, 36B and 38 within which the election petition should be presented and determined. The final place where the process of election petition ends is the Federal Court and the petition ought not to be continued thereafter with any further or other action relating to the election of the candidate before an ordinary court. The elected representative should be allowed to perform his functions and carry out his duties under the

A Constitution and the law without any uncertainty as to his position or threat of his election being nullified or avoided. We would like it to be understood that there should be final closure and an end to the continuing saga of election disputes. The underlying reason for this is the necessity for a speedy and final determination of an election issue. We find support in this regard the Privy
B Council's lucid explanation on the reason as to why the determination of an election was final and not appealable under the previous s. 36 of the Act 5 which we think is relevant to the present appeal that it was essential that such matters should be determined as quickly as possible so that the Assembly itself and the electors of the representatives thereto should know their rights
C at the earliest possible moment. [*Devan Nair v. Yong Kuan Teik* [1967] 1 LNS 37; [1967] 1 MLJ 261].

[31] By reasons as aforesaid and in conclusion, we dismiss the appeal and affirm the decision of the learned High Court Judge. There is no order as to costs. As we have stated at the outset and agreed by both learned counsels
D for the appellant and respondent, this decision binds the second appeal in Rayuan Sivil No: W-02(IM)-885-05/2014. Accordingly we also dismiss the appeal in the second case with no order as to costs.

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